LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 16 1968
JOHN F. DAVIS, CLERK

No. 347

In the Supreme Court of the United States

OCTOBER TERM, 1968

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY OF KENTUCKY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
EDWARD R. WALL,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 347

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY OF KENTUCKY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. 12–13) is reported at 394 F. 2d 616. The Board's decision and order (S.J.A. 127a–160a)[1] are reported at 158 NLRB 258.

JURISDICTION

The order of the court of appeals was entered on May 10, 1968 (Pet. 12). The petition for a writ of certiorari was filed on July 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." and "S.J.A." refer to the portions of the record printed in the Joint Appendix and Supplemental Joint Appendix to the briefs in the court below.

319-699—68

QUESTIONS PRESENTED

1. Whether the Board reasonably found that the Company's two district offices in Cleveland, Ohio, comprised an appropriate bargaining unit.

2. Whether the Board properly refused to allow relitigation in the unfair labor practice case of issues decided in a prior representation proceeding.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition.

STATEMENT

Petitioner sells and issues industrial life insurance policies in Kentucky, Ohio, and Indiana. In addition to the home office in Louisville, Kentucky, petitioner maintains eight district offices in Kentucky and seven in Ohio. There are single district offices in Cincinnati, Dayton, Columbus, Youngstown, and Akron, and two in Cleveland. (J.A. 45a–46a.)

On February 4, 1964, the Union [2] filed a representation petition seeking certification as the bargaining representative of the debit agents working out of petitioner's two district offices in Cleveland. Pursuant to Section 9(c)(1)(A) of the Act (29 U.S.C. 159(c)(1)(A)), a hearing was held on the petition, at which the following facts were presented in the testimony of petitioner's vice-president:

Each of petitioner's district offices is under the supervision of a district manager who reports directly

[2] Insurance Workers International Union, AFL–CIO.

to the vice-president (J.A. 45a–46a, 57a, 60a). Each district office is staffed by debit agents and superintendents, who periodically audit the debit agents' books (J.A. 54a, 84a–85a). The superintendents are responsible to the district managers, who must account for all premiums collected (J.A. 75a). Special agents are assigned by the home office to various district offices to assist debit agents in sales techniques (J.A. 57a–58a).[3]

The debit agents sell insurance and collect the premiums. Each agent services an assigned territory, known as a debit, and reports to the district office three times weekly to turn in collections (J.A. 67a, 80a).[4] Although there is no formal employment contract, all debit agents are subject to company-wide wage policies and employee benefits. New agents undergo a two-week indoctrination conducted by the district manager. The district managers discipline agents when necessary, and decide whether to order a final accounting of the debit, leading to termination of the agent's employment (J.A. 54a). While the vice-president makes the ultimate decision on separations, the decision of the district manager to order a final audit almost always leads to termination (J.A. 55a).

Agents are rarely transferred from one district to another, and there is ordinarily no business or social contact among the debit agents except at the district office level (J.A. 70a, 80a). District managers have

[3] The special agents were excluded from the bargaining unit by stipulation of the parties.

[4] Industrial life insurance premiums are payable weekly (J.A. 65a–66a).

supervisory responsibility only for the personnel of their respective district offices (J.A. 70a).

Finding that each district office was a self-contained operating unit, that there was substantial distance between the district offices, that there was separate, immediate supervision in each district office, and that transfers or interchange among offices was limited, the Regional Director concluded that each district office was a separate administrative entity which would constitute an appropriate bargaining unit (J.A. 19a). The Regional Director further found that the grouping of the debit agents of the two Cleveland district offices in a single unit was justified by "cogent geographic considerations" (*ibid.*).[5] Accordingly, and in view of the absence of any history of collective bargaining and the fact that no union sought to represent a broader unit, he directed that an election be conducted among the debit agents in a unit consisting of the Company's two district offices in Cleveland (J.A. 18a-19a).[6] The Union won the ensuing election and was certified as the bargaining representative in that unit (S.J.A. 129a).

Petitioner refused to bargain with the Union, and an unfair labor practice complaint issued. The Trial Examiner granted the General Counsel's motion for judgment on the pleadings, on the grounds that there were no factual issues, since petitioner admitted the

[5] The closest district office to Cleveland is in Akron, some 30 miles away.

[6] The Company submitted a Request for Review to the Board, which was denied on the ground that it raised no substantial issue (S.J.A. 129a).

refusal to bargain in its answer, and that petitioner intended to offer no evidence that had not previously been evaluated in the representation proceeding (S.J.A. 137a).[7] The Board affirmed, and ordered petitioner to bargain with the Union on request and to post appropriate notices (S.J.A. 140a-141a).

The court of appeals enforced the order, holding that the Board had adequately articulated the bases for its ruling that the two Cleveland district offices constituted an appropriate unit, and that it had not given controlling weight to the extent of union organization or otherwise abused its discretion. The court also held that petitioner's claim that it was denied due process was without substance (Pet. 12–13).

ARGUMENT

1. Section 9(b) of the Act empowers the Board to decide whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." In view of this broad authority and the expertise involved in such determinations, the finding that a unit is appropriate is not to be set aside unless the Board has acted arbitrarily (*Packard Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491–492), or has failed

[7] In its answer to the Examiner's second show cause order, petitioner asserted that it intended to litigate the issue (raised in its prior request for review of the election order (J.A. 35a–36a)) that the Regional Director was "biased and prejudiced" in that he allegedly did not read petitioner's brief prior to issuing his decision (J.A. 9a). In addition, petitioner asserted the need to develop in further detail its position that the certified unit was not appropriate (J.A. 10aa).

clearly to articulate the basis for its determination (*National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442–443). The court below correctly held that there was no warrant for disturbing the Board's unit determination here.

The record fully supports the finding that each district office is "a separate administrative entity through which the Employer conducts its business operations" (J.A. 19a). While a single district office would constitute an appropriate unit,[8] a unit of two or more district offices may also be appropriate where there is, as in this case, a reasonable degree of geographic coherence among such offices.[9] Petitioner's Cleveland offices are geographically separate, not only from the Louisville home office, but from petitioner's nearest other district office, which is approximately 30 miles away in Akron.

Since there were cogent reasons for the Board's unit determination, apart from the extent of union organization, there was no violation of Section 9(c)(5) of the Act. The Court made clear in *Metropolitan Life Ins. Co., supra*, 380 U.S. at 441–442, that the extent of

[8] See *National Labor Relations Board* v. *Western and Southern Life Ins. Co.*, 391 F. 2d 119 (C.A. 3); *Corrie Corp. of Charleston* v. *National Labor Relations Board*, 375 F. 2d 149, 154–155 (C.A. 4); *National Labor Relations Board* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690 (C.A. 4); *Metropolitan Life Ins. Co. (Woonsocket, R.I.)*, 156 NLRB 1408.

[9] See, *e.g.*, *National Labor Relations Board* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 202 (C.A. 6), certiorari denied, 328 U.S. 866 (unit of three mines in one locality, excluding a fourth mine 37 miles away); *Texas Pipe Line Co.* v. *National Labor Relations Board*, 296 F. 2d 208, 213 (C.A. 5) (unit of three of the employer's seven operating divisions).

union organization may be considered by the Board, as long as it is not the controlling factor in its unit determination.

2. The court below properly rejected petitioner's contention that it was denied procedural due process by the Board's refusal to permit it to relitigate the unit determination in the unfair labor practice proceeding. The only basis for seeking relitigation was the claim that the Regional Director was biased, based entirely on an unsupported allegation that he had failed to consider petitioner's brief. Since the Board had previously rejected that contention in denying petitioner's request to review the direction of an election (nn. 6, 7, *supra*), the Board was fully justified in foreclosing relitigation of the unit determination. See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146, 157–158; *National Labor Relations Board* v. *Air Control Products,* 335 F. 2d 245, 249 (C.A. 5); *National Labor Relations Board* v. *Hollywood Brands, Inc.* (C.A. 7), 68 LRRM 2878, 2880, and cases cited therein.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
EDWARD E. WALL,
Attorney,
National Labor Relations Board.
SEPTEMBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968